IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

CRI-2020-412-000036
[2020] NZHC 3428

BETWEEN	JAMES TUWHANGAI Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 16 December 2020

Appearances: M J Scally for Appellant
C J Bernhardt for Respondent

Judgment: 18 December 2020

JUDGMENT OF DUNNINGHAM J

This judgment was delivered by me on 18 December 2020 at 12.15 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date 18 December 2020

Introduction

[1] On 17 September 2020 Judge Turner sentenced James Tuwhangai to two years' imprisonment for strangulation, injuring with intent to injure and threatening to kill. He declined to impose home detention. The Judge also made a protection order in favour of the victim.

[2] Mr Tuwhangai initially appealed his sentence on two grounds:

(a) on the basis of a cultural report under s 27 Sentencing Act 2002 that was not before the District Court for sentencing which he said warranted a reduction of his sentence of between 5–10 per cent;

(b) that his sentence of imprisonment should have been converted to one of home detention on the basis of his youth, remorse and rehabilitative prospects.

He now only pursues the second ground of appeal.

Facts

[3] At the time of his violent offending against his partner in January 2020, Mr Tuwhangai was 18 years old. They had been in a relationship since mid-2019.

[4] On 26 January 2020 the pair were together at a family property in Waitahuna near Lawrence. Mr Tuwhangai's father and several children under 10 were also present. At some point Mr Tuwhangai became upset while examining the victim's phone because he discovered a photo of the victim together with another man and wrongly assumed it evidence of an intimate liaison. They began to argue.

[5] This sparked a verbal and physical attack on the victim over the course of six hours.

[6] Mr Tuwhangai started to yell at her and throw things about. He punched her in the face several times until she ran from him and he chased her around the property. She called out for someone to call the police. Mr Tuwhangai threw the victim's phone on the ground, smashing it, and told her she couldn't call anyone now.

[7] Mr Tuwhangai smashed a bedroom window with his hand. He then went outside to the victim's car and threw objects at it, smashing the windscreen and front windows. He then drove away in her car.

[8] He returned shortly afterwards. He wrenched the steering wheel and column from the vehicle, rendering it undriveable. He told the victim she now had no vehicle

and then began to chase her around the property again. He grabbed her around the neck and she called out to Mr Tuwhangai's father for help. Mr Tuwhangai dragged her to a bed and threw her on it, then punched her to the face and eye. He chased her again.

[9] Mr Tuwhangai again took hold of the victim by her neck, using both hands, and he lifted her so she was at the extent of her toes. The victim could not breathe. He told her he was going to kill her and that she was going to die. One of the children said to him, "don't kill my aunty". The strangulation lasted about 10 seconds. In her victim impact statement, the victim reports losing consciousness and thinking she was going to die.

[10] When he released her she dropped to the ground and was on her hands and knees. She covered her head with her hands as Mr Tuwhangai punched her several times to the head. He told her to "fuck off" and he put her belongings outside the house. She took her bags and began to walk away.

[11] Mr Tuwhangai got into a car and drove aggressively towards the victim. She had to get out of the way quickly to avoid getting hit. He turned around and drove back towards her quickly, stopping quickly at her feet. He got out of the car took the victim's bags from her and threw them over a fence into a nearby school's grounds.

[12] He then jumped the fence, opened one of the victim's bags, tearing property from the bag and casting it around the field. He returned to the car and drove it onto the field where the possessions were strewn, told the victim no one was going to save her and then drove back to the house.

[13] The victim gathered her things with the help of the children and walked back to the house. When she got there Mr Tuwhangai was still sitting in the car in the driveway. He began to verbally abuse her, calling her names such as "slut". He got out and punched her in the face twice. He got out and punched her in the face twice before driving off.

[14] The victim was taken to hospital. As a result of the assaults she received a fractured left cheek bone, a concussion, a black right eye, marks and bruising of her neck and shoulders.

District Court decision

[15] On 5 May 2020 Judge Turner gave a sentence indication of two years' imprisonment to Mr Tuwhangai.[1] Mr Tuwhangai accepted that indication and was sentenced on the basis of the indication by Judge Turner on 17 September 2020.[2] The question for the Judge at sentencing was therefore whether the sentence should be imprisonment or home detention.

Sentence indication

[16] The Judge considered Mr Tuwhangai's actions in attacking the victim arose out of jealousy, possessiveness and control. She was entitled to feel safe at the family home and in the company of other family members. This included young and impressionable children. The property was in an isolated rural area and the resultant vulnerability of the victim was increased by Mr Tuwhangai's immobilisation of her car and destruction of her phone.

[17] The Judge described the offending as a "prolonged attack…over a period of six hours". He said Mr Tuwhangai prevented the victim from leaving multiple times, he damaged her car, and noted there were two separate strangulations. Also that this was accompanied by a threat to kill and degrading verbal abuse. Finally, he noted the victim had suffered significant injuries and acknowledged the impact of the offending on others.

[18] The Judge adopted strangulation as the lead offence. He highlighted that in *T v Police* Doogue J noted there were several features of strangulation that make it inherently serious including the risk that death can result quite readily and that it is linked with long-term emotional and psychological harm.[3]

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1 *Police v Tuwhangai* DC Dunedin CRI-2020-012-197, 5 May 2020.
2 *Police v Tuwhangai* [2020] NZDC 18866.
3 *T v Police* [2019] NZHC 3375, [2020] 2 NZLR 270.

[19] For the offending before him, Judge Turner said he would adopt a starting point of three years and three months (39 months) on the strangulation charge. He would then make an uplift of six months for the other charges, noting his caution not to double count for these. Thus, indicating an adjusted starting point of 45 months.

[20] For personal mitigating factors, the Judge recognised Mr Tuwhangai's youth (being 18 years old at the time), his lack of previous convictions (though his family harm history and history of breaching police safety orders was noted), and the rehabilitative efforts (engaging with counselling, and with the services of Tokomairiro Waiora Inc – a Whānau Ora service provider) he had made. For these mitigating factors, the Judge made a discount of 25 per cent (11 months). Finally, he gave a 22 per cent discount (10 months) for Mr Tuwhangai's guilty pleas on 14 May 2020 after first entering his not guilty pleas on 25 February 2020. Thus, the end sentence indication was two years' imprisonment.

Sentence

[21] At sentencing Judge Turner rejected Ms Scally's submission that the pre-sentence report, "…overall, … could be seen as positive". He highlighted that the report said Mr Tuwhangai, when interviewed by the probation officer, minimised his offending and "victim blamed". The Judge said the report found Mr Tuwhangai's remorse was "minimal" and stated that he described his victim as a "fucking bitch" twice. The Judge said it was notable that these comments followed steps he had taken to undertake a Stopping Violence programme and his seeking counselling to address relationship issues, indicating he had not learnt anything from these. He considered his risk of harm to others was high.

[22] Coming to the question of whether the sentence of imprisonment should be converted to home detention, the Judge cited *Kumar v R* where in this Court Kós J said:[4]

> Home detention is generally suitable only for those whose remorse is patent, such that three things can be said. First, that they deserve a less restrictive sentence. Secondly, that it is, therefore, unnecessary to imprison in order to denounce and deter a recalcitrant. Thirdly, that they may confidently be

[4] *Kumar v R* [2014] NZHC 146 at [19] (footnote omitted).

> expected to convert that less restrictive sentence into a meaningful rehabilitative response. Demonstrable and verifiable remorse is a tangible indicator of likely rehabilitation through a community-based sentence. It is also a basis for the community to have confidence that its trust will not be abused by re-offending. Logic and experience demonstrate that the remorseful are far more likely to correct a diversion into criminal conduct than those who are not.

[23] Judge Turner found, on the basis of the pre-sentence report and Mr Tuwhangai's presentation in court, that he was not convinced there was any genuine remorse. Mr Tuwhangai had not learnt from any of the programmes he had been through prior to sentencing. Therefore, home detention was inappropriate and a sentence of two years' imprisonment was imposed. The Judge also made a protection order in favour of the victim under s 123B of the Sentencing Act.

Principles on appeal

[24] Appeals against sentence are allowed as of right by s 244 of the Criminal Procedure Act 2011, and must be determined in accordance with s 250 of that Act. An appeal against sentence may only be allowed by this Court if it is satisfied that there has been an error in the imposition of the sentence and that a different sentence should be imposed.[5] As the Court of Appeal stated in *Tutakangahau v R*, "an appellate court will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles".[6] It is only appropriate for this court to intervene and substitute its own views if the sentence being appealed is "manifestly excessive" and not justified by the relevant sentencing principles.[7]

[25] Home detention is an alternative to a short-term sentence of imprisonment.[8] The court must be satisfied that the purposes for which the sentence is being imposed cannot be achieved by any less restrictive sentence.[9]

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5 Criminal Procedure Act 2011, ss 250(2) and 250(3).
6 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
7 *Ripia v R* [2011] NZCA 101 at [15].
8 Sentencing Act 2002, s 15A(1)(b).
9 Section 15A(1)(a).

[26] An appeal court must focus on the identification of error, having regard to the discretionary nature of the decision.[10] The Court of Appeal in *Manikpersadh v R* said:[11]

> [11] This Court identified the appropriate approach in *James v R* in this way:[12]
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> > [17] We record that an appeal against a refusal to grant home detention does not provide an opportunity to revisit or review the merits. The question is whether [the Judge] erred in exercising his sentencing discretion: that is, did he apply an incorrect principle, give insufficient or excessive weight to a factor, or was he plainly wrong? Ms Guy Kidd for the Crown properly accepts that home detention can satisfy the objectives of deterrence and denunciation, but to a degree. We are satisfied, in accordance with earlier authority in this Court, that the decision about whether home detention will meet those objectives in a particular case is a strictly evaluative exercise. It is a matter of judgment for the sentencing Judge to determine whether home detention is an adequate response to the seriousness of the offending.
> >
> > (Footnotes omitted).
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> [12] We agree with counsel for the respondent's assessment that the proper approach of an appellate Court in cases such as this is that "the choice between home detention and a short sentence of imprisonment is the exercise of a fettered discretion, with appellate review focusing … on the identification of error, if any, in the court below".

[27] In *Fairbrother v R*, the Court of Appeal stated:[13]

> [30] … the judge must make a considered and principled choice between the two forms of sentence, recognising that both serve the principles of denunciation and deterrence, and identifying which of them better qualifies as the least restrictive sentence to impose taking into account all the purposes of sentencing.
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> [31] Sometimes, as this Court said in *R v D (CA253/2008)*, that can prove a very difficult exercise of judgment; and "the closer one gets to the dividing line, the more difficult it becomes to articulate reasons for preferring one approach to the other".[14]

Submissions

Appellant's submissions

[28] Although Ms Scally abandoned her argument that the s 27 cultural report recently prepared by Monica Lei warranted a further discount, she still sought its

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10 *Doolan v R* [2011] NZCA 542 at [39].
11 *Manikpersadh v R* [2011] NZCA 452.
12 *James v R* [2010] NZCA 206, (2010) 24 NZTC 24,271.
13 *Fairbrother v R* [2013] NZCA 340 (footnote original).
14 *R v D (CA253/2008)* [2008] NZCA 254 at [66].

admission on the basis it supported her submissions that the Judge gave insufficient consideration to rehabilitation and reintegration when sentencing Mr Tuwhangai to prison. Ms Scally submits that the cultural report should be admitted into evidence because "it could not have with reasonably [sic] diligence been provided prior to sentencing…".

[29] Ms Scally also contends that Mr Tuwhangai does have genuine remorse, and points to a finding to that effect in the cultural report. She suggests that Mr Tuwhangai may have had a better rapport with the cultural report writer than the pre-sentence report writer, thus enabling him to feel comfortable in expressing his remorse. She also says the Judge erred by placing too much weight on the negative aspects of the pre-sentence report and insufficient weight on the positive aspects, such Mr Tuwhangai taking responsibility for "most" of the offending, distinguishing his case from that in *Kumar*, the case relied upon by Judge Turner. Counsel also contends the Judge did not sufficiently weigh the rehabilitative efforts undertaken by Mr Tuwhangai before sentencing, including two programmes, noting the pre-sentence report's positive comment on his engagement in this respect.

[30] Ms Scally contends the Judge also failed to consider that home detention would adequately denounce and deter the offending.[15] She notes home detention is a significant sentence in its own right.

[31] Next, she cites *Moa v Police* where on appeal this Court quashed a sentence of 12 months' imprisonment and imposed home detention instead, emphasising the benefits of home detention in terms of the rehabilitation of young men.[16]

[32] In terms of *Kumar*, where this Court found home detention inappropriate due to a lack of remorse, Ms Scally submits the present case can be distinguished because she contends that there is remorse here and Judge Turner erred on this point. Given Mr Tuwhangai's age and rehabilitative efforts, she says a sentence of home detention should have been imposed.

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15 *Fairbrother v R* [2013] NZCA 340.
16 *Moa v Police* [2017] NZHC 223.

Respondent's submissions

[33] Mr Bernhardt says the Police do not oppose the s 27 report being adduced for the purposes of this appeal.

[34] Mr Bernhardt says Mr Tuwhangai has been unable to point to an error in the Judge's discretionary decision to prefer a sentence of imprisonment to home detention, rather his counsel's submissions were directed at weight.

[35] Counsel submits the Judge appropriately weighed the factors relevant to the assessment of the suitability of home detention, and that the Judge was not required to give an exhaustive list of every relevant sentencing factor. The Judge made a considered and principled choice between the two sentencing options, identifying that imprisonment better served the principles of denunciation and deterrence, in accordance with *Fairbrother*.

Analysis

Admission of s 27 report

[36] The Court of Appeal has observed that s 27 reports should not be produced for the first time on appeal.[17] However, a cultural report may be admitted into evidence on appeal where it is in the interests of justice or where the prosecutor will not be prejudiced.[18] Given Ms Scally has abandoned her argument that it supports a discount in sentence and there is no prejudice to the prosecution, I allow it to be put before the Court.

[37] For completeness, I add that the evidence before the Court, including from the s 27 report, does not suggest that Mr Tuwhangai has suffered cultural deprivation in the requisite way articulated by the Court of Appeal in *Zhang v R*.[19] He was raised "in a stable and supportive family environment" and, while his parents' relationship was not perfect, they clearly cared deeply about his welfare, to the extent of moving their family and children to a different island to protect them from the influence and pull of

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17 *Carroll v R* [2019] NZCA 172 at [8].
18 *Poi v R* [2020] NZCA 312 at [30].
19 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

gang life in their original area. Further, from the ages of five to 13 – spanning his primary and intermediate schooling – he attended a kura kaupapa Māori, a school operating under tikanga Māori and using te reo Māori as a medium of instruction. His mother, fluent in te reo, was instrumental in establishing the kōhanga reo he attended before his kura days. The report also notes Mr Tuwhangai developed an affinity for the environment at an early age, noting he explained how he helped his fathers raise and ride horses, and hunt and dive for kai. Thus, during his upbringing he was fortunate to have had parents who strived to ensure he was connected to his culture, te reo and to the whenua, and steered away from the negative influence of gangs.

[38] This is not in my view, a case of obvious cultural deprivation and it was appropriate that this ground of appeal was abandoned.

Remorse

[39] I address the submissions on remorse because although a discount is not sought on this ground it is relevant to Mr Tuwhangai's rehabilitative prospects. While Mr Tuwhangai challenges the Judge's finding that he had not shown remorse, on the material before this Court on appeal, I consider the Judge was justified in reaching that view. Although Ms Scally says the pre-sentence report notes him taking ownership for some of his offending, a bare (and incomplete) acceptance of responsibility cannot rise to the level of demonstrated remorse required before a discrete discount will be made.[20]

[40] Moreover, the entirety of the pre-sentence report must be understood to contextualise Mr Tuwhangai's incomplete acceptance of responsibility. It reports that he denied there was more than one punch (despite his guilty plea to the charge of injuring with intent to injure). It says he stated that he said, "all the injuries she sustained to her head and face were from one punch, not multiple". The report set out that:

> During the interview he was assessed as being unaware to the severity of the crimes and situation. He…denied…aspects [of the offending] such as there being more than one punch. Remorse was minimal and he called her a "f*cking b*tch" twice.

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[20] *Moses v R* [2020] NZCA 296, (2020) 29 CRNZ 381 at [24].

[41] Later the report restates the probation officer's conclusion that remorse was minimal and there was no offer to make amends. Clearly from his lack of insight into the harm of his offending, his minimisation of his offending and his highly offensive references to the victim, the probation officer was justified in concluding remorse was minimal.

[42] I also do not consider that the s 27 report materially changes the position. While the report comments that Mr Tuwhangai is "definitely keen to do restorative justice" the statement that he takes ownership of the offending and shows genuine remorse is not consistent with other information in the report. For example, earlier in the s 27 report, he seeks to minimise his offending by introducing a narrative of the offending that involved him being provoked into his attack by the victim coming at him with a knife. This is a fact, of course, that was not agreed to by the parties when Mr Tuwhangai came up for sentencing and forms no part of the summary of facts.

[43] According to the s 27 report, he also claims he never intended to physically hurt the victim; yet he pleaded guilty on the basis of the summary of facts[21] which says he punched her a number of times over the course of the hours-long verbal and physical attack, strangled her twice, and threatened to kill her during one of the instances of strangulation. Thus, he continues to minimise his offending.

[44] Further, this latest claim of a lack of intent to physically hurt the victim is not only inconsistent with his guilty pleas and his acceptance of the summary of facts, it is consistent with his earlier insistence with the probation officer during his pre-sentence report interview that he only punched the victim once, despite the extensive injuries she suffered. The probation officer saw this claim as going to his lack of remorse. It appears nothing has changed.

[45] I do not consider the Judge was wrong to find Mr Tuwhangai had not demonstrated any genuine remorse and he was not required to take unsubstantiated claims of remorse at face value.[22]

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21 See Sentencing Act 2002, s 24; and Criminal Procedure Rules 2012, r 5A.1.

22 *Moses v* R, above n 20, at [18], citing *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [64].

Rehabilitative efforts

[46] Ms Scally points to the letter from Mr Sayles who confirms Mr Tuwhangai engaged in counselling sessions with him and has "made good changes" in that time. She also points to the letters from Tokomairo Waiora Inc, a kaupapa Māori health and social service provider, which was supporting Mr Tuwhangai and his family, which speak about his progress in getting his driver licence and doing voluntary work, and to the evidence he had engaged with Stopping Violence through a referral from Tokomairo Waiora. However, as the Judge noted, the fact Mr Tuwhangai did not demonstrate remorse, and actually minimised his offending and called the victim a "fucking bitch" twice, indicated that he has not learnt anything from the courses he attended in the lead-up to his offending. On appeal Mr Tuwhangai has not been able to show that conclusion was not justified.

Should home detention have been imposed?

[47] In an appeal against a refusal of home detention, an appeal court will be reluctant to interfere with the sentencing judge's assessment, having regard to discretionary nature of the decision.[23] Here, Judge Turner considered the contents of the pre-sentence report and concluded Mr Tuwhangai had a high propensity for violence and was at a high risk of harming others, pointing to his failure to learn from the courses and counselling he attended prior to sentencing. He considered the patent lack of remorse to guide his decision to decline to impose home detention, in accordance with *Kumar*.[24]

[48] I do not depart from the Judge's concerns in that regard. I accept that the very serious and prolonged physical and psychological violence by Mr Tuwhangai against his partner, with a lack of genuine remorse after the fact, demanded a strong deterrent and denunciatory sentencing response.

[49] However, there are particular concerns here which I consider were not fully addressed. Mr Tuwhangai is clearly at risk of being drawn into gang culture. It

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23 *Doolan*, above n 10, at [39]. See also Simon France (ed) *Adams on Criminal Law – Sentencing* (online ed, Thomson Reuters) at [SA80A.10].

24 *Kumar*, above n 4.

prompted his parents' decision to move from the North Island. It was also a concern mentioned in the pre-sentence report which ultimately recommended intensive supervision and community detention. The report writer pointed out that Mr Tuwhangai presented in all red clothing and has notable swastikas on his hands, tattooed into his skin, and there was a concern that Mr Tuwhangai aspired to be involved in the Mongrel Mob despite denying this. The report writer said that Mr Tuwhangai "presents as an impressionable teenager". The report noted that he had good support from his whānau to be compliant with a sentence of home detention and a suitable address was identified where he would be with family members. It says that he "appears ready and willing to participate in programmes and counselling" and, if he actively participates in such programmes, his likelihood of reoffending was assessed as medium.

[50] In my view, Mr Tuwhangai is particularly vulnerable to embarking on a career of offending, and this would only be exacerbated by a minimum of a year in prison. At this juncture, he has already served three months' imprisonment. I consider this has given him a taste of prison life and if it is to have a deterrent effect, it should have had that by now.

[51] There is a clear fork in the road for Mr Tuwhangai. His family are reaching out to him and urging him to take one path, but I suspect the gangs and prison life will be urging him to take another. In these circumstances, I consider the principles of rehabilitation and reintegration, particularly for a first time offender, need to be given greater prominence in the sentence which is handed down.

[52] It is for this reason, and this reason alone, that I am allowing this appeal.

[53] The sentence of two years' imprisonment is quashed and in its place I impose a sentence of nine months' home detention to commence on 22 December 2020. This short delay is to allow appropriate travel and transfer arrangements to be made.

[54] Home detention is to be served at the residence of X. It is to be served on the standard conditions and the following special conditions:

(a) You are not to associate with or contact X without the prior written approval of a probation officer.

(b) You are to attend an assessment for a domestic violence programme as directed by a probation officer and to attend and complete any counselling, treatment or programme as recommended by the assessment as directed by and to the satisfaction of a probation officer.

[55] I expect that should the opportunity for employment arise, then the conditions of home detention should be able to be varied to accommodate this, as I believe this will assist Mr Tuwhangai's rehabilitation.

[56] I reserve leave to the parties to seek additional or varied orders should any practical difficulties arise with the proposed conditions for commencing and serving home detention.

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